Supreme Court, U.S.
FILED
011143 JAN 24 2002
OFFICE OF THE CLERK

No. 01 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.

TACHA, Chief Judge, BALDOCK, Circuit Judge, BRORBY, Senior Circuit Judge, KELLY, Circuit Judge sitting by designation in the U.S. District Court, Dist. of NM
Respondents.

On Appeal to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Tod N. Rockefeller, pro se
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

The Circuit Executive, U.S. 10th Cir.
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257
(303) 844 - 3157

END

59 pp

Questions Presented

1. Whether the United States ("U.S.") Court of Appeals ("CoA") for the Tenth Circuit ("10th Cir.") has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court ?

2. Whether the U.S. CoA for the 10th Cir. has decided an important federal question in a way that conflicts with relevant decisions of this Court ?

3. Whether Petitioner has been punished by Respondents for objecting to Defendant's lack of concern for safety, violating his First Amendment right of Free Speech ?

4. Whether all of the above have resulted in a violation of Petitioner's Seventh Amendment right of Trial by Jury ?

5. Whether the actions taken by Respondents and the lower court have been in criminal collusion and conspiracy with Defendant to deprive Petitioner of his Constitutional rights ?

Parties Proceeding

Petitioner was plaintiff (99-1059 PK/KBM) and subsequently Appellant to the U.S. CoA for the 10th Cir. (00-2480 & 01-2054).

Respondents (Tacha, Baldock, Brorby, and Kelly) are judges who dismissed the cases above. Respondents' contact information is: The Circuit Executive, U.S. 10th Cir., Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257. (303) 844 - 3157

Table of Contents

Questions Presented	i
Parties to Proceeding	ii
Table of Authorities	iii, iv
Rules /Jurisdiction	iv
Constitutional Provisions at Issue	1
Statement of the Case	1
Argument	2 thru 7
Appendix 1	A-1 thru A-8
Appendix 2	A-9
Appendix 3	A-10 thru A-48

Table of Authorities

CONSTITUTIONAL PROVISIONS

U.S. Const., Amend. I
U.S. Const., Amend. V
U.S. Const., Amend. VII

STATUTES

18 U.S.C. §§ 242, 371
28 U.S.C. § 1254 (1)
31 U.S.C. § 3730 (h)
42 U.S.C. §§ 2000e-1 through 2000e-17
42 U.S.C. § 6961
42 U.S.C. §§ 12181 - 12189

CASES

Adams v. Indiana Bell Telephone Co., Inc., 2 F.Supp. 2d 1077 (S.D. Ind. 1988)
Adikes v. S.H. Kress & Co., 398 U.S. 144, 149, 150 (1970)
Betts v. Brady, 316 U.S. 455, 462 (1942)
Brady v. Maryland, 373 U.S. 83, 86-88 (1963)
Bridges v. California, 314 U.S. 252, 263,270,275 (1941)
Davidson Oil Company Supply Inc. v. Klockner, Inc., 908 F.2d 1238 (C.A. (Tex) 1990), on rehearing 917 F.2d 185.
Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)
English v. General Electric Co., 496 U.S. 72, 73 (1990)
Fiske v. Kansas, 274 U.S. 380, 385 (1927)
Gravel v. United States, 408 U.S. 606, 627 (1972)
Hampton v. Dillard Dept. Stores, Inc., 18 F.Supp. 2d 1256 (D.Kan. 1998)

Imbler v. Pachtman, 424 U.S. 409, 429 (1976)
Jackson v. Firestone Tire and Rubber Co. & Goodyear Tire and Rubber Co., 788 F.2d 1070, 1089, 1090 (1986)
Johnson v. Wash. Metropolitan Area Transit Auth., 764 F.Supp. 1568 (D.D.C. 1991); opinion amended 790 F.Sup. 1174
Mapp v. Ohio, 367 U.S. 643, 659 (1961)
Olmstead v. United States, 277 U.S. 438, 485 (1928)
O'Shea v. Littleton, 414 U.S. 488, 503 (1974)
Pennekamp v. Florida, 328 U.S. 331, 346 (1946)
Pickering v. Board of Education of Township, Will County, 391 U.S. 563, 568 (1968)
Robinson v. Runyun,149 F.3d 507 (C.A.6 (Ohio) 1998)
R & W Technical Services Ltd.; Gregory M. Reagan v. Commodity Futures Trading Commission, 205 F.3d 165, 177 (C.A. 5th Cir. 2000)
Scheuer v. Rhodes, 416 U.S. 232, 235, 236 (1974)
United States v. Price, 383 U.S. 787, 791, 792 (1966)
Uveges v. Pennsylvania, 335 U.S. 437 - 439 (1948)
Walker v. Johnson, 312 U.S. 275, 286, 287 (1941)
Williams v. United States, 341 U.S. 97, 99, 100 (1951)

Rules

Supreme Court ("S.Ct.") Rules 10(a), 10(c), & 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The U.S. CoA for the 10th Cir. denied Petitioner's appeals (00-2480 & 01-2054) with an Order filed on NOV 15, 2001.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Firth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves retaliations taken upon Petitioner by his former employer, the United States Department of Energy ("DOE"). Petitioner is a disabled individual who was employed with the DOE as an Environmental Scientist at the Waste Isolation Pilot Plant ("WIPP") in Southeastern New Mexico. The WIPP is a controversial nuclear waste repository for the disposal of defense program generated transuranic waste. Petitioner is an honest man who takes seriously his professional and moral obligations to protect people and the environment.

When Petitioner began identifying safety deficiencies, and contractor false claims at WIPP, the DOE engaged in reprisals towards Petitioner. The retaliations against Petitioner culminated in his removal from federal service on 12/10/97 for putative "poor performance".

Petitioner filed a complaint in the U.S. District Court, District of New Mexico concerning his removal from federal service, Case no. 99-1059 PK / KBM. This case was dismissed from the district court with alleged knowingly false representations and defiance of the doctrine of *stare decisis*. Two appeals were then filed by Petitioner with the U.S. CoA for the 10th Cir. concerning 99-1059's dismissal. The 10th Cir. has affirmed the dismissal of Petitioner's case with additional alleged knowingly false representations and defiance of the doctrine of *stare decisis*.

Argument

Question 1. Improper suppression of evidence, especially that which is incriminating and demonstrates pretext, is a violation of Due Process of law which "is a denial of fundamental fairness shocking to the universal sense of justice . . ." See Betts, 316 U.S. at 462. This most certainly is a departure "from the accepted and usual course of judicial proceedings, . . ." See S.Ct. Rule 10(a)

"Issue IV" of Petitioner's Opening Brief, served on 3/28/01 to Respondents, describes in detail a design failure of the DOE's model RH-72B nuclear waste shipping cask. This shipping cask design failure involves a faulty Radioactive Containment Seal of the cask, which represents a severe danger to public safety. Petitioner had worked himself on the safety report for this cask and he was the one whom had identified the design failure.

Petitioner's discovery Request No. 10 was concerning documents related to the approval of the safety report of the RH-72B cask. Defendant DOE claimed that for Request No. 10: "the information has nothing to do with the issues in this case." See doc. 48 at 3. This assertion of Defendant is obviously bogus.

Respondents supported the lower court's denial of Petitioner's Motion to Compel (doc 45), and claimed Petitioner was allowed "ample discovery". See Appendix ("App.") 1 at A-4, A-5.
This evidence has been improperly suppressed by Respondents, and this is a Due Process violation. See Brady, 373 U.S. at 86-88; see also Walker, 312 U.S. at 286, 287. This ruling of Respondents has departed from the accepted and usual course of judicial proceedings.

Petitioner clearly demonstrated to Respondents that this evidence, concerning the RH-72B cask's safety report, provides establishment of pretext towards Petitioner's removal from federal service by the DOE. This is thoroughly outlined on page A-36 of App. 3. Improper suppression of probative evidence should have been reversible error of the lower court. See Jackson, 788 F.2d at 1089, 1090. Also, Respondents' misleading of Petitioner as to the admissibility of the evidence is also not in accordance with the accepted course of judicial proceedings. See R & W Technical Services, Ltd., 205 F.3d at 177. The issues and facts outlined above adequately raises the **Federal Constitutional Question** in this case of a Due Process violation. See Uveges, 335 U.S. at 438, 439.

Question 2. In addition to the improper suppression of evidence described above, Respondents have excluded very relevant admissible evidence that was actually submitted by Petitioner. See Exhibit II of Appendix 3 at A-27 thru A-30. The descriptions of each of the 25 items of evidence, detailed on A-27 and A-28 alone, very clearly demonstrate far more than the slightest amount of probative worth required for these items to be classified as relevant admissible evidence. See Adams, 2 F.Supp. 2d 1077; Robinson, 149 F.3d 507. This action of Respondents certainly conflicts with this Court's ruling that the basic standard for determining the relevance of evidence is a "liberal" one. See Daubert, 509 U.S. 579 (1993); Hampton, 18 F.Supp. 2d 1256.

To go a very major step further, in not only establishing the relevance of the evidence above, but to also clearly demonstrate that Respondents have allegedly made knowingly false claims and

violated a local rule of law see A-15 thru A-19. Respondents have knowingly improperly excluded relevant admissible evidence, which again, conflicts with relevant decisions of this Court. See Walker, 312 U.S. at 286, 287; Brady, 373 U.S. at 86-88. Respondents have dismissed Petitioner's appeals without allowing placement and consideration of relevant, admissible, and incriminating evidence into the record of this case. See Scheuer, 416 U.S. at 235, 236.

Petitioner very thoroughly described the relevance of his evidence above at A-31 thru A-46. The DOE, lower court, and Respondents have all failed to controvert the facts detailed within A-31 thru A-46. Therefore, the issues and facts above adequately raises, again, the **Federal Constitutional Question** in this case of another Due Process violation. See Uveges, 335 U.S. at 438, 439.

Question 3. Petitioner had attempted to identify and correct several serious safety deficiencies at the WIPP while he worked there. One of these safety issues concerning the DOE's RH-72B nuclear waste shipping cask was mentioned above. Petitioner had issued a report dated 4/18/96 outlining several dangers with this cask. The DOE had rewarded Petitioner with a failing annual performance appraisal that rating period. All of this had been explained to Respondents. See A-37 Other safety deficiencies which Petitioner had attempted to correct included flawed air monitoring of radionuclide aerosols in and about the WIPP Site. Another safety issue that Petitioner wrote up in a report of his concerned inadequate fire protection controls underground within the WIPP repository.

Petitioner's reports were attached to a 9/1/98 sworn declaration of his that was sent to the New Mexico Environment Department ("NMED") and the New Mexico Attorney General's office. These materials were within **"Exhibit ADA-25"** which Petitioner had attempted to make, unsuccessfully, part of the record of case 99-1059 in the district court. See A-28 The reprisals towards Petitioner in close temporal relation to his activities, described above, included two failing annual performance appraisals and two transfers. The district court and Respondents excluded and ignored all of Petitioner's evidence of what occurred above.

Respondents have punished Petitioner for objecting to the DOE's lack of concern about safety violating Petitioner's First Amendment right of Free Speech, "a prized American privilege." See Bridges, 314 U.S. at 270 "Free discussion of the problems of society is a cardinal principle of Americanism - a principle which all are zealous to preserve." Also, there is "danger to public welfare of supposedly wrongful judicial conduct." See Pennekamp, 328 U.S. at 346 Respondents have decided another important Federal Constitutional Question in a way that conflicts with relevant decisions of this Court.

Question 4. All of what Respondents have done, as described above, have been for one purpose essential to the DOE. This effort has had the objective of keeping Petitioner from reaching a trial by jury. The DOE does not want a jury to be exposed to evidence of the agency's wrongdoing. The DOE is guilty of decades of wrongdoing that has been covered-up until fairly recently. E.g.: former Energy Secretary Richardson's 1/00 admission of the agency's responsibility for contaminating 3,000 workers.

There is an important danger to our technical society concerning the punishment of scientists, such as Petitioner, who try to speak up to resolve safety issues. If this kind of practice continues . . . scientists will be afraid to speak up and will remain silent. The "prized American privilege" of Free Speech will exist no longer.

Question 5. The methodology by which the district court and Respondents have dismissed Petitioner's False Claims Act ("FCA") allegations is comprised of knowingly false representations, ignoring Congress, and defying the doctrine of *stare decisis*. These actions of both courts have allegedly been in criminal collusion and conspiracy with the DOE to violate Petitioner's Constitutional rights as described above and will be additionally detailed below. Both courts have allegedly violated 18 U.S.C. §§ 242, 371.

Defendant DOE had claimed that the FCA's civil remedy provided within 31 U.S.C. § 3730(h) does not apply to federal employees. The DOE also claimed that the federal employee's exclusive remedy for whistleblowing is the Civil Service Reform Act ("CSRA"). Both courts simply repeated the DOE's claims. See, for example, pages A-5 and A-6. Both courts completely ignored Plaintiff's response to these claims. Within Plaintiff's Response to Defendant's Motion to Dismiss Plaintiff's Retaliation Claim Arising under the FCA (doc 42) Petitioner stated the following:

> "When the Whistleblower Protection Act ("WPA") of 1989 was enacted (which amended section 2303(b)(8) of the CSRA), Congress indicated that it [CSRA] is NOT to be the exclusive remedy for whistleblowers. See 5 U.S.C. § 1222,

Joint Explanatory Statement, 135 Cong. Rec. 4,514; 5,035 (1989)."

See doc 42 at 1 Also within doc 42 was:

"Moore v. Department of Energy, 1999-CAA-15 (Jun 14, 1999 Order of DOL ALJ Larry W. Price), stating: The Secretary has rejected similar arguments that the CSRA provides a presumptive and exclusive remedy for federal employee whistleblowers in Conley v.McClellan Air Force Base, 84-WPC-1 (Sec'y Sept. 7, 1993); Pogue v. U.S. Dept. of Labor, 940 F. 2d 1287 (9th Cir. 1987). Therefore, I deny Respondent's Motion to Dismiss the Complaint based on sovereign immunity and the exclusive remedy is under CSRA."

It seems quite apparent that the district court and Respondents have criminally violated Petitioner's 1st, 5th , and 7th Amendment rights, which also violates 18 U.S.C. §§ 242, 371. See Adikes, 398 U.S. at 149, 150. As noted within Mapp, 367 U.S. at 659: "Nothing can destroy a government more quickly than its failure to observe its own laws, **or worse**, its disregard of the charter of its own existence."

APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v.

SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE), *
Defendant-Appellee.

Nos. 00-2480 & 01-2054
(D.C. No. 99-1059 PJK/KBM)
(D.N.M.)

ORDER AND JUDGMENT **

Before TACHA, Chief Judge, BALDOCK, Circuit Judge, and BRORBY, Senior Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeals. See Fed.R.App.P 34(a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Plaintiff Tod N. Rockefeller, appearing *pro se*, appeals the district court's grant of summary judgement to his former employer, the DOE, on his consolidated complaints alleging disability discrimination and retaliation in violation of Title VII and the False Claims Act. *** We review the grant of summary judgement *de novo*, using the

---

* Spencer Abraham is substituted for his predecessor, Bill Richardson, as Secretary of Energy. See Fed.R.App.P. 43(c)(2).

** This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel.

same standard as the district court. *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239 (10th Cir. 2001). Summary judgement is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law." Fed.R.Civ.P. 56(c). We affirm.

I. Background

Plaintiff was an environmental specialist with the DOE when, in September 1997, the Department notified him that it proposed to remove him from that position because of poor performance. He filed a claim with the Merit Systems Protection Board (MSPB) claiming the proposed termination was in retaliation for alleged whistle-blowing activities. An MSPB administrative judge issued an initial decision in November 1997 finding that defendant had not engaged in whistle-blowing activities. Plaintiff filed a petition for review with the MSPB.

The Department terminated plaintiff in December 1997 and he filed another claim with the MSPB, claiming he was fired because of alleged disabilities, in retaliation for protected activity

---

*** Plaintiff filed a notice of appeal (No. 00-2480) form the district court's September 28, 2000 order dismissing his retaliation claim under the False Claims Act. This court issued an order to show cause as to why that appeal should not be dismissed for lack of a final order adjudicating all claims. The district court subsequently entered a final order on December 20, 2000 dismissing all of plaintiff's remaining claims, from which plaintiff has also appealed (No. 01-2054). We will treat plaintiff's appeal in No. 00-2480 as a premature notice of appeal which became effective upon the district court's final order. See Lewis v. B.F. Goodrich Co., 850 F.2d 641, 645 (10th Cir. 1988)(en banc). Accordingly, we have jurisdiction over both appeals, which have been consolidated.

under Title VII and in retaliation for alleged whistle-blowing activities. Following an administrative hearing, an MSPB administrative judge found that the Department had sustained its burden of demonstrating that plaintiff's performance was unacceptable. The administrative judge further found that plaintiff had failed to demonstrate that he had engaged in protected whistle-blowing activities, that his termination was related to his claimed whistle-blowing activities or employment discrimination activities, that he was disabled or that his termination was related to his alleged disability. Plaintiff filed a petition for review with the MSPB. He also filed a claim with the Department of Labor, raising the same claims as raised before the MSPB.

Plaintiff then filed a motion with the MSPB requesting it dismiss both his pending petitions for review. The MSPB granted his motion, but informed plaintiff of his deadline for filing any request to re-file his petitions. Plaintiff later filed an untimely motion with the MSPB seeking to re-file his petitions for review. The MSPB denied his motion, finding that the petitions were untimely filed without good cause. The MSPB informed plaintiff that his only right of review was to the Federal Circuit Court of Appeals. Plaintiff did not file an appeal of the MSPB's order, but instead filed a motion for reconsideration with the Equal Employment Opportunity Commission (EEOC), which denied the motion for lack of jurisdiction to review the MSPB's order.

Plaintiff then filed his complaint in New Mexico federal dsitrict court, alleging that he was denied reasonable accommodations for his claimed disabilities, in violation of the Americans With Disabilities Act (ADA), 42 U.S.C. §§ 12181-12189, and the Rehabilitation Act, 29 U.S.C. §§ 701-96,

and that he suffered adverse employment actions in retaliation for complaining to the Department's EEO office, in violation of Title VII, 42 U.S.C. § 2000e through § 2000e-17. Plaintiff amended his complaint to further allege that he suffered adverse employment actions, including his termination, in retaliation for engaging in whistle-blowing activities, in violation of 31 U.S.C. § 3730(h) of the False Claims Act (FCA). Plaintiff later filed another complaint, which was consolidated with his earlier complaint, alleging that the Department intimidated his physicians to prevent him from receiving treatment, in violation of the ADA and the Rehabilitation Act.

II. Analysis

A. Discovery Motions

Plaintiff contends the district court erred in various rulings it made concerning the discovery process. We review discovery rulings for an abuse of discretion. See *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1386 (10th Cir. 1994). Plaintiff first argues the district court erred in denying his motion to compel production of numerous documents, including documents relating to all of the Department's firing decisions; the personnel records of all employees plaintiff suspected of having any role in his termination; records pertaining to the Department's search methodology in responding to his discovery requests; and information concerning the Department's Waste Isolation Pilot Program. The district court denied plaintiff's motion to compel, finding that his requests for production were overly broad, unduly burdensome and unrestricted by topic and date and that plaintiff had failed to demonstrate the relevance or potential relevance of the requested information. We find that the district court allowed plaintiff ample discovery and did not abuse its

discretion in denying plaintiff's motion to compel. See *Munoz v. St. Mary-Corwin Hosp.*, 221 F.3d1160, 1169 (10th Cir. 2000).

Next, plaintiff argues the district court erroneously denied his motion requesting it to accept a 748-page binder of "self-authenticated" documents. R. Doc. 56. The district court denied the motion, but explained to plaintiff that he could reference and attach any documents he viewed as relevant in seeking or defending against summary judgement or at trial, and that the Department could raise any objections at that time. We find no error in the district court's order.

B. False Claims Act

The FCA authorizes suit by a private person who has been discriminated against in his employment because of his whistle-blowing activities under the FCA. 31 U.S.C. § 3730(h). The district court dismissed plaintiff's FCA claim, however, because the civil remedy provided in § 3730(h) does not apply to federal employees; rather, as a federal employee, plaintiff's exclusive remedy for his allegation that he was discharged in retaliation for whistle-blowing activities is under the Civil Service Reform Act. See Le Blanc v. United States, 50 F.3d 1025, 1029-30 (Fed. Cir. 1995); Daly v. Dep't of Energy, 741 F.Supp. 202, 205-06 (D.Colo. 1990).

Plaintiff claims that the district court's dismissal of his FCA claims was in error, but he does not take issue with its legal conclusion that § 3730(h) is inapplicable to federal employees or that his exclusive remedy was under the CSRA. Although plaintiff's argument is hard to follow, it appears he is arguing that he intended this claim to be under the Solid Waste Disposal Act, 42 U.S.C. § 6971 (SWDA), and that the district court mischaracterized or disregarded his SWDA claim.

This argument is without merit. Plaintiff's complaint clearly raised an FCA claim and he did not assert any claim under the SWDA. Plaintiff did attempt to amend his complaint to add claims under the Clean Air Act and the SWDA after the close of discovery and after the deadline imposed by the district court for filing any amended complaint, but the district court denied his request. The district court did not abuse its discretion in denying plaintiff's request for leave to amend his complaint. See *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 799 (10th Cir. 1998) (holding that untimeliness alone is sufficient reason to deny leave to amend).

C. Rehabilitation Act Claim

Plaintiff amended his complaint to allege that the Department violated the Rehabilitation Act and the ADA by requesting medical information from his physicians and medical providers, which he claims the Department requested in order to harass and intimidate his physicians. The district court granted summary judgement in favor of the Department, finding no evidence that the Department's request was a pretext for discrimination. Plaintiff contends the district court erred in dismissing his claim, arguing, incorrectly, that the ADA prohibits requests for medical information.

Under the ADA and the Rehabilitation Act, the employer has the right to request medical information. See *Templeton v. Neodata Servs., Inc.*, 162 F.3d 617, 619 (10th Cir. 1998). The undisputed evidence demonstrates that the Department requested this medical information pending assessment of plaintiff's request for accommodation due to claimed disabilities. We agree with the district court that the Department's request for medical information was reasonable and that

plaintiff presented no evidence to support his speculative allegation that the request was pretextual. Accordingly, the district court correctly granted summary judgement in favor of the Department on this claim.

D. Remaining Disability and Retaliation Claims

The district court dismissed all of plaintiff's remaining claims that he was denied reasonable accommodations for his claimed disabilities and that he suffered adverse employment actions in retaliation for complaining to the Department's EEO office. "[F]ollowing an adverse agency decision, the employee has the option in a "mixed case" complaint of filing a civil action in the district court rather than appealing to the MSPB." *Wells v. Shalala*, 228 F.3d 1137, 1143 (10th Cir. 2000); see also *Austin v. Merit Sys. Prot. Bd.*, 136 F.3d 782, 783 (Fed. Cir. 1998)(explaining that "mixed case" is appeal to MSPB from adverse personnel action, coupled with allegations that action was based on prohibited discrimination). However, only the Federal Circuit Court of Appeals has jurisdiction to review MSPB jurisdictional decisions involving mixed claims. See *Wall v. United States*, 871 F.2d 1540, 1542-44 (10th Cir. 1989).

Therefore, to the extent plaintiff sought to appeal the MSPB's dismissal of his request for review as untimely, the district court correctly ruled that it lacked jurisdiction over plaintiff's claim. Further, to the extent plaintiff sought to appeal his mixed case complaint in New Mexico district court, his complaint was untimely because it was filed more than a year after the date the decision of the MSPB's administrative judge became final. See 5 U.S.C. § 7703(b)(2) (in mixed case, complainant must appeal MSPB's decision to district court within thirty days after receiving notice of judicially reviewable action).

On appeal, plaintiff argues that the district court should have excused the late filing of his complaint under a "continuing violation" theory or the doctrine of equitable tolling. Neither theory is applicable in this case. Because it is clear from the record that plaintiff was aware of the basis of his complaints at the time he filed his initial complaint with the MSPB, he "cannot rely on a continuing violation theory to avoid the statutory time bar." *Burlington v. United Air Lines, Inc.*, 186 F.3d 1301, 1311 (10th Cir. 1999)(holding that a "continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred"). Further, the doctrine of equitable tolling is not warranted because neither the Department nor the MSPB deceived or misled plaintiff regarding the procedural prerequisites to appealing his claims nor are there any other extraordinary circumstances that prevented plaintiff from asserting his rights. See *Mosley v. Pena*, 100 F.3d 1515, 1518 (10th Cir. 1996).

The judgement of the United States District Court for the District of New Mexico is AFFIRMED and plaintiff's motion for remand is DENIED. The mandate shall issue forthwith.

Entered for the Court
Deanell Reece Tacha
Chief Judge

FILED
United States Court of Appeals
Tenth Circuit
NOV 15 2001
PATRICK FISHER
Clerk

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v.

BILL RICHARDSON, in his official capacity as Secretary, United States Department of Energy (DOE),
Defendant-Appellee.

Nos. 00-2480 & 01-2054
(D.C. No. 99-1059 PJK/KBM)
(D.N.M.)

ORDER
Filed March 7, 2001

The court reserves judgement on the jurisdictional issue raised in this court's show cause order of December 7, 2000. The matter will be referred to the panel assigned to hear these appeals on the merits.

These appeals are consolidated for purposes of briefing, record and submission. Briefing on the merits shall proceed in accordance with the schedule set forth in the Tenth Circuit Rules.

Entered for the Court
PATRICK FISHER,
Clerk of the Court

by: s/Ellen Rich Reiter
Deputy Clerk/Jurisdictional Attorney

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v.

SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE), *
Defendant-Appellee.

Nos. 00-2480 & 01-2054
(D.C. No. 99-1059 PJK/KBM)
(D.N.M.)

MOTION FOR REMAND TO TRIAL COURT

COMES NOW Appellant Rockefeller and moves this Court for the issuance of an Order granting remand of Appellant's lawsuit back to Trial Court for further proceedings to arrive at justice for Appellee's alleged retaliations leading to Appellant's removal from federal service. Appellee has claimed that there are no genuine issues of material fact, and was entitled to summary judgement as a matter of law. The facts contrary to Appellee's claim are set forth in Appellant's Memorandum in Support of Motion for Remand to Trial Court filed herein.

Dated: March 3rd, 2001

Respectfully submitted,
s/Tod N. Rockefeller, pro se
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v.

SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE), *
Defendant-Appellee.

Nos. 00-2480 & 01-2054
(D.C. No. 99-1059 PJK/KBM)
(D.N.M.)

MEMORANDUM IN SUPPORT OF
MOTION FOR REMAND TO TRIAL COURT

For the justifications and explanations which follow below, the dismissal of Appellant's lawsuit was clearly an act of prejudice and bias against him. Appellee **has not and can not** controvert the facts of law below concerning the applicable Solid Waste Disposal Act ("SWDA").

I. Background Statement of Facts

1. On September 30, 1997, Appellant filed an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (MSPB), concerning his proposed removal from federal service. In the IRA, Appellant alleged that he was being fired for whistleblowing. On November 3, 1997, the MSPB issued its Initial Decision.

2. In its Initial Decision, the MSPB had failed to investigate Appellant's fourth Equal Employment Opportunity (EEO) Complaint of discrimination and reprisals by Appellee. The MSPB had also claimed that Appellant had not demonstrated that he was a disabled person

despite being supplied with letters from three of Appellant's doctors. MSPB dismissed Appellant's appeal claiming lack of jurisdiction.

3. In December 1997, the Department of Energy (DOE) terminated Appellant's employment for alleged poor performance. (Amended Complaint, ¶ 19).

4. Appellant petitioned the MSPB for full board review of its IRA determination, and before the Initial Decision concerning his removal became final, he asked that the MSPB Board stay its proceedings pending adjudication of similar claims filed with the Department of Labor(DOL). Appellant later filed a motion with the MSPB to dismiss his petitions for review. The MSPB issued an Order granting Appellant's motion and requiring that any petition review be re-filed on or before December 15, 1998, or within 30 days from the date of a final decision by the DOL, whichever occurred first.

5. On January 25th, 1999, Appellant re-filed his petitions for review with the MSPB. Appellant acknowledged that his petitions were untimely, and asked that the late filing be tolled due to aspects of his disability being exacerbated by alleged activities of Appellee.

6. On April 28th, 1999, the MSPB issued its Opinion and Order, finding that the petitions were untimely, without good cause being shown, and ordered the dismissal of Plaintiff's petitions.

7. Appellant had felt that it was a mistake to ever get involved with the MSPB due to their claim that he was not disabled, no investigation of his EEO Complaint, no production of a transcript of the proceedings (violation of 5 U.S.C. § 7701(a)(1)) during the 3/98 hearing, and more. See doc. 58 at 1 thru 8.

II. The SWDA Applies to Appellee's Waste Isolation Pilot Plant (WIPP) Disposal Site.

8. The **WIPP Land Withdrawal Act**, Public Law 102-579, as amended by Public Law 104-201, outlines requirements and law applicable to the project. An excerpt of this law is attached as **Exhibit I** and **demonstrates the applicability of the SWDA to the WIPP within "Sec. 9. Compliance with Environmental Laws and Regulations."**

9. Congress expressed a concern and intent to regulate and control the activities of Appellee regarding environmental compliance and safety. The Federal Facilities Compliance Act of 1992 (FFCAct) was enacted that modified the SWDA (42 U.S.C. 6901 et. seq.). The FFCAct added specific restrictions and waivers designed to increase the safety of "mixed" waste (radioactive and hazardous) that apply to Appellee. Appellee's disposal site for this "mixed" waste is the WIPP. Congress went to the extent of revising the SWDA they way they did because the Appellee's safety record is quite questionable. E.g.: Appellee's 1/29/99 admission to the New York Times of decades of worker abuses resulting in the contamination of 3,000 workers; Tritium contamination of the drinking water table surrounding Brookhaven National Lab; and much more. The Cold War is over, we can start doing a lot better now for our nation.

10. **Congress**, therefore, **expressly waived Appellee's sovereign immunity** and required compliance with **all** laws which apply towards management and disposal of theses wastes. Appellee, in this instant lawsuit, is attempting to overturn law (**SWDA**) enacted by the legislative branch. **See 42 U.S.C. § 6961(a) - Exhibit I.**

III. The SWDA Waives Appellee's Sovereign Immunity

11. Appellee and judge Kelly have avoided and ignored the SWDA. The claim that: "the civil remedy provision in the act does not apply to him as a former government employee" (doc.64 at 3), is incorrect due to the SWDA's waiver. Kelly also claims that:

> "The civil remedy provided in 31 U.S.C. § 3730(h) does not waive the federal government's sovereign immunity. Such a waiver must be unequivocally expressed in the statutory provisions, not implied, see Lane v. Pena 518 U.S. 187, 192 (1996), and the statute contains not a hint of waiver." (Doc. 53 at 3).

12. Dismissal of Appellant's False Claims Act (FCA) retaliation claims due to alleged lack of waiver of the sovereign immunity of Appellee conflicts with the requirements of the SWDA and is grounds for reversal.

13. Due to the specific references and actual quotes made of the SWDA requirements by Appellant (doc.42 at 3,4 and doc. 57 at 3,4), judge Kelly's dismissal of this instant lawsuit for the justifications quoted above demonstrate extreme prejudice and bias against Appellant.

IV. The SWDA Requires That All Laws, Concerned With WIPP's Operation, Apply To Appellee As They Do To "Any Person" In The "Same Manner".

14. The district court attempts to claim that, only law applicable to federal employees apply to

Appellee, in this instant lawsuit, such as those involving the MSPB such as 5 U.S.C. § 7703(b)(2) (doc. 64 at 6) to eliminate the application of the equitable tolling doctrine. This assertion conflicts with the requirements of the SWDA. **See 42 U.S.C. § 6961(a) - Exhibit I.**

15. Appellee or the district court have not once addressed any of the requirements of the SWDA. Instead, Appellee only comes up with irrelevant arguments and case law citations which have no bearing on the requirements of the SWDA. Judge Kelly has supported Appellee's irrelevant arguments which is grounds for the reversal of the 10/23/00 Order (doc. 64).

V. Judge Kelly Improperly Dispelled 748 Pages of Relevant Admissible Evidence.

16. Appellant had become aware of another case in the same Court with the same Defendant as this instant Complaint where evidence was attached to the Plaintiff's response defending against dismissal, and this evidence was dispelled because it was not properly authenticated. See Marlene Flor v. Hazel O'Leary, CIV 93-1343 JC/WWD (USDC Dist. of NM). Due to gaining this knowledge, Appellant went to great lengths to properly authenticate his evidence which was intended to be used to defend against his lawsuit's dismissal. E.g.: 35 notarized Certificates of Acknowledgment in total were prepared in accordance with Fed.R.Evid. 902 (8). **See Exhibit II for 2 of 35.**

17. A motion by Appellant for the Court to accept self-authenticated evidence into the record was filed on 10/4/00 (doc. 56). The Court Clerk filed this evidence (100 pages or so) and sent the

chamber copy to the judge. On Thursday 10/19/00 the Court filed a **response** by Appellant (doc. 58) to Appellee's motion for partial summary judgement along with about 650 additional pages of self-authenticated evidence to defend his lawsuit against dismissal.

18. Appellee telephoned Appellant shortly after he received this additional evidence (the same day it was received by the Court, 10/19/00) and asked Appellant if he had filed it with the Court. Appellant informed Appellee that the evidence had been properly filed with the Court. Appellant also subsequently served upon Appellee a Request for Admissions of the Authenticity of all of the self-authenticated evidence (doc. 61) (748 pages in total with over 500 pages (specified to each page) where the originals were in possession of Appellee).

19. With only **one** work day from when the Court in Albuquerque received the balance of the self-authenticated evidence (Thursday 10/19/00), judge Kelly issued an Order (doc. 59) on Monday 10/23/00 denying the motion to include this evidence.

20. This 10/23 Order (doc. 59) claims that Appellant was "seeking to have them (documents) incorporated into the record under Fed.R.Evid. 1004(3)." (doc. 59 at 5) This representation is not true. Appellant's numerous explanations of the relevance of this evidence within his motion above (doc. 56) and further specific explanations of relevance within his **response** to defend against the dismissal of his lawsuit have NOT been controverted (25 numbered examples in left margins, see **Exhibit III**)(emphasis added).

21. The requirements of Fed.R.Evid. 401 and 402, therefore, apply due to uncontroverted facts within doc.58 supporting the relevance of

Appellant's self-authenticated evidence. Rule 402 specifies that **all** relevant evidence **is** admissible. Judge Kelly has apparently excluded admissible evidence for the purpose of exercising extreme bias and prejudice against Appellant in the dismissal of his lawsuit. This action should be reversible.

22. Judge Kelly has used a spurious claim concerning Fed.R.Evid. 1004(3) to attempt to override the specific explanations of the relevance of the evidence, described above, to improperly exclude Complainant's self-acknowledged evidence. In addition, judge Kelly also states within his 10/23/00 Order above (doc. 59) that:

> **"Mr. Rockefeller may reference and attach documents he views as relevant in seeking or defending against summary judgement . . ., and the government can raise any objections, including authenticity."**
> **See doc. 59 at 5.**

This representation is knowingly false. Appellant's response attempting to defend "against summary judgement" had already been filed on 10/19/00 (doc. 58) with **25** references to attached "relevant" documents (emphasis added). This is reversible error of law. **See Exhibit III**

23. Oddly enough, **the Court Clerk** also **returned all of the evidence** above (including the evidence that was previously filed on 10/4/00) to Appellant **on Thursday 10/19/00.** This is **the same day that Defendant had telephoned Complainant and had asked if the evidence had been filed with the Court.** This, along with the 10/23 Order above suggest that *ex parte* communications may have been taking place between Defendant, Court Clerk, and Kelly.

VI. Judge Kelly Violated D.N.M. LR-Civ. 10.3(c) and 41.2

24. Rather than to object to the explanations of the relevance of the self-authenticated evidence or attempt to controvert the associated material facts, **both** Appellee and judge Kelly chose to exert efforts to exclude this evidence improperly. Their claim is that Appellant failed to specifically controvert the material facts of the movant or Appellee. They both claim that Appellant admitted to the "uncontroverted material facts" within Appellee's motion described above (doc. 54) to justify his lawsuit's dismissal.

25. Judge Kelly claimed that: "Plaintiff has not complied with D.N.M. LR-Civ.56.1 . . ." **See doc. 64 at 2.**

26. While Appellant did not provide numerals on the left side of the pages of his response to controvert Appellee's alleged material facts, he did refer by number to "¶ 5 of Motion for Judgement." Also there were "four numbered alleged areas of "undisputed material facts"" within this referenced paragraph of Appellant's response addressed as "first", "second", "third", and "fourth" further down. **See Exhibit III at 1, 3, 6, & 7.** In addition, Appellant actually exceeded the requirement of D.N.M. LR-Civ.56.1 in one respect by quoting the exact words of the Appellee's alleged areas of "undisputed material facts" to specifically controvert them. See again Exhibit III at 1, 3, 6, & 7.

27. Appellant admits that the format of his response referenced directly above (doc. 58) is not in a convenient or standard form. It is a "Non-Conforming" paper (D.N.M.LR-Civ10.3(c)).

28. Judge Kelly did **not** have a "Notice of deficiency and deadline for correcting the deficiency" sent to Appellant as D.N.M. LR-Civ.10.3(c) & 41.2 require. Rather than comply with these local rules, Kelly dismissed with prejudice Appellant's "Non-Conforming" papers without affording Appellant the required 45 day period to allow corrections to be made. **Kelly went as far as violating a local rule of law himself to apply prejudice towards Appellant**. It is alleged that this was the only means available for Kelly to assist Appellee in having Appellant's's lawsuit dismissed.

29. Please examine **Exhibit III**. There are 25 specific explanations of the relevance of Appellant's evidence presented to the Court. On the left margin, hand written numerals within circles are applied next to the line where each such explanation is to be found (1 thru 25). This will provide an indication of why Appellant's evidence had to be improperly eliminated, clearly demonstrating prejudice to prevent the Court from finding justice.

30. When considering a motion for summary judgement, the court must examine all the evidence in the light most favorable to the non-moving party. See Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995); Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Judge Kelly has allegedly violated D.N.M. LR-Civ.10.3(c) & 41.2 to avoid examining any of Complainant's evidence.

VII. The Equitable Tolling Doctrine Applies to this Lawsuit.

31. Appellant had thoroughly detailed a well founded basis for the application of equitable

tolling with numerous specific references to attached evidence, six applicable 10th Cir. case law citations and one from the U.S. Supreme Court. See doc. 58 at 9 - 12.

32. Appellee claims that Zipes v. Trans World Airlines, Inc., 455 U.S. 385; 102 S.Ct. 1127 (1982), does not apply to this lawsuit due to Appellant's appeal to the MSPB. See doc. 60 at 2.

33. Appellee is mistaken due to the applicable waivers of the SWDA which require that **all** laws that are related to hazardous and mixed waste management and disposal apply including all employee protection provisions, not just those that apply to federal employees.

34. Appellee is again attempting to reply as if the SWDA conveniently does not exist. Appellee is wrong. Appellee's attempt to eliminate the application of the equitable tolling doctrine from this particular lawsuit is bogus. The claims which Appellee makes would have merit possibly if the SWDA did not apply, but that is not the case.

35. Appellant Specifically referenced nine exhibits of relevant admissible evidence concerning the applicability of the equitable tolling doctrine to this lawsuit. It is alleged that this evidence was so incriminating to Appellee, that it had to be improperly eliminated from the record of this lawsuit as described above.

36. What is bizarre and quite frankly nonsense is judge Kelly's comment or claim that Appellant should have known, during December of 1997, that his rights were going to be violated concerning alleged Blacklisting that would take place during September of 1999. See doc. 64 at 7.

37. Remember that the alleged continuing violation is concerning **1999 Blacklisting** subsequent to Appellant's employment with

Appellee. See doc. 58 at 10, 11. How is Appellant supposed to be aware "of the basis of his complaints" of Blacklisting in 1999 by "previously" filing an "IRA" appeal during December of 1997, **two years before ?** This sounds as if Judge Kelly may have lost touch with reality. Appellant does **not** possess the power to know what is going to occur two years in the future (**emphasis added**). **Appellant is not some kind of spaceman.**

VIII. Appellant's Constitutional Rights Have Been Violated.

38. All of these matters specifically described above very seriously violate Appellant's U.S. Constitutional rights. It is alleged that the circumstances above have violated Appellant's right of **Free Speech** due to his punishment for objecting to Appellee's disregard for safety. E.g.: Appellant's review and report outlining a **design failure** of Appellee's RH-72B nuclear waste shipping cask **resulting in compromise of the cask's Radioactive Containment Seal** representing a **severe danger to public safety**.

39. Complainant's right of **Due Process** of law has been violated by Kelly's improper exclusion of relevant admissible evidence.

40. As a result of the improper exclusion of evidence, Complainant has been denied his right of a **Trial by Jury**.

41. All of the above have denied Complainant of his right of **Equal Protection** under the law.

42. These alleged actions of Kelly and Appellee represent a very serious internal threat to the democracy of this nation from both its executive and judicial branches.

43. As U.S. Supreme Court Justice Brandeis said:

> **"In a government of laws the existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipotent teacher. For good or ill it teaches the whole people by its example: If government becomes a lawbreaker it breeds contempt for the law."**

Appellee was contacted and opposes this motion.

IX. Prayer for Relief

The only crime that Appellant is guilty of is being honest and concerned for the safety of others. Several errors of law have been made in the dismissal of Appellant's lawsuit as described above. There are numerous genuine issues of material fact that are detailed within the 748 pages of self-authenticated evidence which were improperly excluded from this case. This, along with possible false representations, and equitable tolling represent grounds for reversal of the dismissal of this lawsuit.

Appellant prays that this Court will restore his Constitutional rights by remanding this case back to a Trial Court along with an Order to restore his relevant and admissible evidence to this case's record. A fair jury trial is necessary to decide where the truth lies and arrive at justice.

In accordance with 28 U.S.C. § 1746 and 18 U.S.C. § 1001, I declare under penalties of perjury that the above statements are true and correct to the best of my knowledge, information and belief.

Dated: March 3rd, 2001

Respectfully submitted,
s/Tod N. Rockefeller, pro se
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

AFFIDAVIT OF SERVICE

Tod N. Rockefeller, being duly sworn, states that he mailed the foregoing Motion to:

Patrick Fisher, Clerk
U.S. Court of Appeals - 10th Circuit
Office of the Clerk
The Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Michael Hoses, Ass't U.S. Attorney
U.S. Dept. of Justice
Office of the U.S. Attorney
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

with sufficient first class postage attached thereto on this 3rd day of March, 2001.

s/Tod N. Rockefeller

Subscribed and sworn to before me this 3rd day of March, 2001.

s/Cathy D. Hensley
Notary Public

My commission expires: 2-24-2003

SEAL:
CATHY D. HENSLEY
NOTARY PUBLIC
STATE OF NEW MEXICO

EXHIBIT I to Appendix 3

The relevant portions of this exhibit contain the following:

From the U.S. Code Online via GPO access [Laws in effect as of Jan. 6, 1999]

Title 42 - The Public Health and Welfare
Chapter 82 - **Solid Waste Disposal [Act]**
Subchapter IV - Federal Responsibilities
Sec. 6961. Application of Federal, State, and local law to Federal Facilities

(a) In general

Each department, agency, and instrumentality **of the executive**, legislative, and judicial **branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site,** or (2) engaging in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste **shall be subject to, and comply with, ALL Federal, State, interstate, and local requirements, both substantive and procedural** (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief, respecting control and abatement of solid waste or hazardous waste disposal and management **in the same manner, and to the same extent, as any person is subject to such requirement . . . The United States hereby expressly waives any immunity otherwise applicable to the United States with respect to any such substantive or procedural requirement** (including, but not limited to, any injunctive relief, administrative order or civil or administrative penalty or fine referred to in the preceding sentence, or reasonable service charge).

PUBLIC LAW 102-579

THE WASTE ISOLATION PILOT PLANT (WIPP) LAND WITHDRAWAL ACT

as amended by Public Law 104-201

Section I. Short Title; Table of Contents

(a) Short Title - This Act may be cited as the "WIPP Land Withdrawal Act".

(b) Table of Contents -

Sec. 1 Short title; table of contents.
Sec. 2 Definitions.
Sec. 3 Land withdrawal and reservation for WIPP.
Sec. 4 . . . .

Sec. 9 **Compliance with environmental laws and regulations**.

(a) In General -

(1) **Applicability** - Beginning on the date of the enactment of this Act, **the Secretary** [U.S. Dept.of Energy] **shall comply with respect to WIPP, with -**

(A) the regulations issued by the Administrator . . .

(B) the Clean Air Act (40 U.S.C. 7401 et esq.);

(C) **the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);** . . .

(d) Savings Provision - **The authorities provided** to the Administrator and to the State **pursuant to this section are in addition to the enforcement authorities available to** the State pursuant to State law and to the Administrator, the State, and **any other person, pursuant to the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.)** . . .

EXHIBIT II to Appendix 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
Plaintiff,

v.

BILL RICHARDSON, in his official capacity as Secretary, United States Department of Energy (DOE),
Defendant.

No. 99-1059
PJK/KBM

EVIDENCE OF ALLEGED UNLAWFUL REMOVAL
OF PLAINTIFF FROM FEDERAL SERVICE
ON 12/10/97
EXHIBITS ADA-1 THRU ADA-25

Index of Exhibits

ADA-1:	Tod Rockefeller U.S. Government Working Career.
ADA-2:	Prior High Performance Ratings.
ADA-3:	Chronology of Events (Reprisals) / Congressional Inquiries to the DOE.
ADA-4:	Nature of Disabilities - Narrative, Head Injury: The Facts & Excerpts of 8/97 Neuropsychological Evaluation.
ADA-5:	Equal Employment Opportunity (EEO) First Complaint dated 5/2/97 (EEO-I)
ADA-6:	EEO-II, dated 6/4/97.
ADA-7:	EEO-III, dated 8/9/97.
ADA-8:	EEO-IV, dated 12/5/97.
ADA-9:	EEO Investigator's Memorandum & Various EEO Correspondence.
ADA-10:	EEO Investigation Affidavits of DOE - G.Dials, E.K. Hunter, R. Garcia.

ADA-11:	EEO Investigation Affidavits of Plaintiff.
ADA-12:	EEO Counselor's Report.
ADA-13:	Reasonable Accommodation Request Denial.
ADA-14:	Candidate Selection Record - Vacancy Announcement, AL-03-97 - Carlsbad Area Office Transportation Manager.
ADA-15:	Failing 95/96 Annual Performance Appraisal (PA).
ADA-16:	Formal Grievance Elaboration, dated 12/13/96 (failing 95/96 PA).
ADA-17:	A Guidebook to DOE-AL's Performance Management Excerpt.
ADA-18:	Performance Improvement Plan (PIP), dated 4/8/97.
ADA-19:	PIP Performance Evaluation, dated 8/12/97.
ADA-20:	96/97 Failing Annual PA & 96/97 Performance Element Synopsis, dated 6/30/97.
ADA-21:	Notice of Proposal for Removal, dated 9/2/97.
ADA-22:	Request for Personnel Action & Notice of Decision to Remove, dated 12/9/97.
ADA-23:	T. Rockefeller PIP Materials, dated 10/95 - N/G per DOE.
ADA-24:	Plaintiff's Rebuttal of DOE 8/12/97 PIP Performance Evaluation, dated 3/17/98.
ADA-25:	DOE / Westinghouse Environmental Violations / WIPP RCRA Permit Violations.

CERTIFICATE OF ACKNOWLEDGMENT
Per Rule 902 (8)

The following 558 pages are true and correct copies of documents which are related to Tod N. Rockefeller's federal working career and his 12/10/97 removal from federal service. Some of the government documents contain underlining and notes applied, but the original content of all of these documents remains intact. These documents are organized into "Exhibit ADA-1" thru "ADA-25".

s/Tod N. Rockefeller Date: 9/29/00

ACKNOWLEDGMENT

STATE OF NEW MEXICO)
)SS
COUNTY OF EDDY)

The foregoing instrument was acknowledged before me this 29th day of September, 2000, by Tod Rockefeller.

s/Cassandra Marshall, Notary Public

My Commission expires: March 7, 2004

Seal: CASSANDRA MARSHAL
NOTARY PUBLIC
STATE OF NEW MEXICO

CERTIFICATE OF ACKNOWLEDGMENT
Per Rule 902 (8)

The following 18 pages are true and correct copies of documents concerning the federal working career of Tod N. Rockefeller which will be referred to as "Exhibit ADA-1".

s/Tod N. Rockefeller Date: 9/29/00

ACKNOWLEDGMENT

STATE OF NEW MEXICO)
)SS
COUNTY OF EDDY)

The foregoing instrument was acknowledged before me this 29th day of September, 2000, by Tod Rockefeller.

s/Cassandra Marshall, Notary Public

My Commission expires: March 7, 2004

Seal: CASSANDRA MARSHAL
NOTARY PUBLIC
STATE OF NEW MEXICO

EXHIBIT III to Appendix 3
(the large bold numbers on left refer to the 25 examples of the relevance of Plaintiff's evidence)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,	}	
Plaintiff,	}	
v.	}	No.
	}	99 -1059
BILL RICHARDSON, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),	}	PK/KBM
Defendant.	}	

RESPONSE TO DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGEMENT

Defendant served, on 9/29/00, a Motion for Partial Summary Judgement (henceforth "Motion for Judgement"). Within the Motion for Judgement Defendant lists **four numbered alleged areas of** "undisputed material facts". **See ¶ 5 of Motion for Judgement**. Contrary to Defendant's claim, these findings of the Merit Systems Protection Board ("MSPB") have never yet been subject to Plaintiff's challenge of their merits, but such follows below.

The first claim that "the Department of Energy ("DOE") had sustained its burden of demonstrating that Plaintiff's performance was unacceptable" is without merit. During the 3/98 hearing, pursuant to Plaintiff's 12/29/97 appeal to the MSPB of his termination, he read (word

for word) a document which he had prepared for this hearing dated 3/17/98. See Exhibit ADA-24 within Evidence of Alleged Unlawful Removal of Plaintiff from Federal Service on 12/10/97 (henceforth "Exhibits ADA-1 thru ADA-25"). This document describes eight "Issues" which total 52 instances or claims by Defendant of Plaintiff's "poor performance" that are clearly without merit. This is especially so when the labeled evidence enclosed within this exhibit is examined for each "Issue". The DOE did not respond with any specific rebuttals during the 3/98 hearing, but only with general representations. In addition, numerous alleged knowingly false statements and representations were made by Defendant. For example, within Issue II the DOE claimed my "poor performance" was due to a "poorly written report" (which is demonstrated not to be so within the attached evidence), but it is explained that the DOE itself has provided evidence of the contrary. The only element within Plaintiff's 23 element Performance Improvement Plan ("PIP") that he received a satisfactory rating for was "Element 21" which was: "Written communication is clear, accurate, and concise."

Next, for Issue IV the DOE claimed that Plaintiff produced "goal statements" devoid of "identifying key / critical elements for program DEVELOPMENT and ENHANCEMENT." See Plaintiff's attached letters for this Issue IV dated 6/12/97 and 6/18/97. The 6/18 letter describes "three new Contract Deliverables" Plaintiff had included within the 6/12 document to "ENHANCE the completeness", "and DEVELOPMENT" of his programs. Plaintiff concentrated for a time on this Issue during the

3/98 hearing. Plaintiff had cross-examined his former DOE supervisor, Mr. Kent Hunter, and had presented copies of both documents above to him and asked him if he recalled receiving them. Mr. Hunter recognized the documents and responded that "yes" he had received them. This still is incredulous to Plaintiff that Defendant DOE had used his own words within this particular claim of his "poor performance" (emphasis added). The MSPB ignored this point of Plaintiff's rebuttal of his alleged "poor performance" and numerous others. The MSPB had acted as the DOE's *de facto* defense attorney concerning Plaintiff's 12/29/97 appeal of his termination. Plaintiff also forwarded: "Motion Requesting Disqualification of Judge Seaman from my Case", dated 11/19/97 concerning an earlier appeal. Plaintiff filed "this Motion in accordance with 5 C.F.R. 1201.42 (b) & (c) due to the absence of "Findings of fact and conclusions of law upon all of the material issues of fact and law presented . . ." " The MSPB judge ignored Plaintiff's Motion (emphasis added). In addition, the MSPB did not have a transcript made of the 3/98 hearing which is in violation of 5 U.S.C. § 7701 (a) (1). After Plaintiff received notice of the MSPB's alleged findings, he knew why no transcript was produced.

Plaintiff can not detail each of the alleged false statements and representations made by the DOE concerning his alleged "poor performance" due to space limitations and their number. Plaintiff

6 requests that this Court review Exhibit ADA-24 until it is satisfied that there are genuine material issues of fact questioning Plaintiff's alleged "poor performance". There are numerous such facts within this exhibit supported by attached documented objective evidence to preclude summary judgement. See Anderson v. Liberty

Lobby, Inc., 477 U.S. 242, 256, 91 L.Ed.2d 202, 106 S.Ct. 2505 (1986); Madison v. Deseret Livestock Co., C.A. 10th, 1978, 574 F.2d 1027. Also, a court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried. See Frohmader v. Wayne, C.A. 10th, 1992, 958 F.2d 1024, 1027; Finlay v. Union Pac. R. R. Co., D.C. Kan. 1946, 6 F.R.D. 284.

The second claim of the MSPB was that: "Plaintiff failed to establish that his termination was in retaliation for prior EEO activities." See Plaintiff's Amended Complaint at ¶ 17: "Two days after the DOE's EEO Counselor initiated contact with Mr. Rockefeller's supervisor, . . .", Plaintiff was placed on a Performance Improvement Plan ("PIP"). A federal employee can not be terminated normally without first being placed on a PIP. Plaintiff was placed on this PIP on 4/8/97 which was five months late after receiving failing ratings on 11/12/96, which will be explained below. This extremely late PIP, and additional factors, demonstrates pretext. The PIP was indeed Defendant's intent to remove Plaintiff almost immediately after contact from his EEO Counselor.

The delay of Plaintiff being placed on the PIP during 4/97 and his removal on 12/10/97 bears upon several factors related to the DOE's initial 4/97 intent to remove him. There are several issues which complicated Plaintiff's removal. First

7 is examination of Exhibit ADA-24 which demonstrates the DOE's difficulty in establishing a case for Plaintiff's removal. The same reasoning is why Defendant found it difficult to justify and formulate his PIP. This is why the PIP was five months late (emphasis added). Secondly, on three separate occasions Defendant has made attempts

to have Plaintiff subjected to mental testing. Defendant has a history of using mental testing in retaliations against employees in attempts to build cases against these employees. See Mathew L. Wald: Retribution Seen in Atom Industry - 4 Who Cited Safety Say They Were Told to See Therapists", New York Times, 8/6/89 at 1. Also, the case of a former DOE contractor employee Sherrie Graham Farver who was subjected to mental testing is another example of many. The C.A. of Tennessee ruled in Ms. Farver's favor, Case No. E1999-01840-COA-R3-CV, decided 6/23/00.

Thirdly, the DOE had an investigation performed concerning Plaintiff's first three EEO Complaints during 10/97. The DOE investigation affidavits are filled with alleged knowingly false statements and representations. For clear documented evidence of this see Exhibit ADA-11. Two examples of the DOE's knowingly false statements are representations of Plaintiff's former supervisor, Mr. Kent Hunter, within Exhibit ADA-10. First, ". . ., there is no requirement that a PIP be issued before or after an employee gets a failing rating." This representation is knowingly false (emphasis added). See Exhibit ADA-17. As stated above Plaintiff's PIP was FIVE MONTHS LATE after the 11/96 failing ratings, but issued TWO DAYS after contact with the EEO Counselor. Second, is the statement: "He has been a poor performer since he first came to the Waste Isolation Pilot Plant ("WIPP") Project four years ago." See Exhibit ADA-2, especially the 10/13/94 letter of the DOE WIPP Deputy Manager issued directly upon Plaintiff's specific request to this manager (Plaintiff's complaint of average ratings for his exceptionally high performance).

Finally, Plaintiff was removed on 12/10/97 which was only six weeks before Defendant made a public Record of Decision ("ROD") on 1/23/98 that WIPP was ready to safely transport nuclear waste to the Site for disposal. Plaintiff clearly had to be terminated before this ROD could be made due to his review and identification of the unsafe WIPP RH-72B shipping cask due to design failures that his review had uncovered. See Exhibit ADA-25a and Exhibit CX-18. The design failure and safety issues of the RH-72B shipping cask have never been corrected or rebutted to the best of Plaintiff's knowledge, information, or belief.

Both the issue of Plaintiff's PIP two days after protected EEO activity and his termination six weeks prior to the issue of Defendant's WIPP Safe Transportation ROD, which was related to his whistleblowing concerning an unsafe DOE WIPP nuclear waste shipping cask, are clear establishments of causation for Plaintiff's termination. Compare Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (one and one-half month period between protected activity and adverse action by itself, establish causation) with Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (10th Cir. 1997) (three month period, standing alone, is insufficient to establish causation). Within this instant Complaint (99-1059), there is a significant amount of additional evidence described above besides the close temporal relations to establish causation for the Defendant's adverse employment actions. See Marx v. Schnuck Markets, Inc., 76 F.3d 324 (10th Cir.), cert. denied, 135 L.Ed. 2d 1071, 116 S.Ct. 2552 (1996); Burrus v. United Telephone Co., 683 F.2d 339, 343 (10th Cir. 1982), cert. denied, 459 U.S. 1071, 74 L. Ed. 2d 633, 103 S.Ct. 491 (1982);

Contreras v. Suncast Corp., No. 96 C 3439 (N.D. Ill. Sept. 19, 1997); Schumacher v. Souderton Area School District, 2000 WL 72047 (E.D. Pa. Jan. 21, 2000); Christou v. Hyatt Regency - O'Hare, No. 96 C 2493 (N.D. Ill. Mar. 3, 1998); Whitfield v. Pathmark Stores, Inc., No. Civ. A. 96-246 MMS (D.Del. June 22, 1998); Parker v. Sony Pictures Entertainment, Inc., 19 F. Supp. 2d 141 (S.D. N.Y. 1998).

The third finding of the MSPB was that: "Plaintiff failed to establish that his termination was related to alleged whistleblowing." Relative to rebutting this claim is the situation with the RH-72B shipping cask and the Defendant's ROD described above. In addition, within Plaintiff's 4/18/96 Review of the safety report for the RH-72B cask are 13 unresolved safety issues which were pointed out with expert suggested resolutions. E.g.: resolutions concerning metallurgy.

13 See Exhibit ADA-25a, Attachment A-1. This cask's safety report, to be approved by the Nuclear Regulatory Commission ("NRC"), was a WIPP Disposal Decision Plan ("DDP") milestone. For Plaintiff's complicated, highly technical, and expert review of this cask's safety report, he received failing performance appraisal ratings for that rating period. This is additional evidence of Defendant's pretext for adverse employment actions for Plaintiff's whistleblowing contrary to the claim above.

The fourth finding of the MSPB was that: "Plaintiff failed to establish that he was a disabled person . . ." Within 29 C.F.R. Appendix to Part 1630 is found guidance concerning the definition of the term of a person with a "disability". This guidance applies to both Title I of the Americans with Disabilities Act ("ADA") and Section 504 of the

Rehabilitation Act. Within the Appendix to Part 1630 it is stated:

> "An individual is considered to have a "disability" if that individual either (1) has a physical or mental impairment which substantially limits one or more of that person's major life activities, (2) has a record of such an impairment, or, (3) is regarded by the covered entity as having such an impairment."

Plaintiff had included complete copies of his first four EEO Complaints within his 12/29/97 appeal of his termination to the MSPB. See Exhibits ADA-5 thru ADA-8. As in Exhibit ADA-5, each EEO Complaint contained a seven page "Attachment A" which included letters from three doctors describing Plaintiff's disabilities dating back to 1989, among other information. Plaintiff's EEO Complaints satisfied both of the first two parts of the regulatory definition of a person with a "disability". In addition, within the sworn affidavit of Plaintiff's former DOE supervisor, Mr. Kent Hunter, that was part of the 10/97 Investigation of Plaintiff's first three EEO Complaints is additional evidence. This EEO Investigation file was part of Plaintiff's 12/29/97 appeal to the MSPB. Mr. Hunter stated in his affidavit: "I believe he does have a severe memory problem . . ." This satisfies the third part of the regulatory definition of "disability" above. Plaintiff was "regarded by" Defendant "as having such an impairment". Plaintiff's 12/97 MSPB appeal record therefore contained evidence of his satisfying ALL THREE elements of the definition of being considered as disabled where satisfaction of only ONE of these elements is required (emphasis

added). Despite all of this evidence, the MSPB judge ruled that Plaintiff had "failed to establish that he was a disabled person . . ." ?

In addition, neither Defendant or the MSPB ever performed an investigation of Plaintiff's fourth EEO Complaint ("EEO-IV") of discrimination and retaliations (DOE Case No.98(022)AL). See CIV 00-0652 JC ¶¶ 13, 14 (consolidated with 99-1059 PK/

16 KBM); and Exhibit ADA-8. The failure to investigate EEO-IV is a violation of 29 C.F.R. 1614.102 (c)(5). This is significant additional evidence of the allegation that the MSPB judge was indeed acting as a *de facto* DOE defense attorney.

Plaintiff was deposed by Defendant on 8/24/00 and Plaintiff received the transcript of his deposition on 9/27/00. Plaintiff has until 10/27/00 to read, make corrections, and sign this transcript. Defendant is very well aware of this, yet has included an excerpt of such transcript prematurely. Plaintiff has not yet had time to review this transcript in its entirety, but the excerpt enclosed with the Defendant's Motion for Judgement does require revision concerning both doctors Hollingsworth and Daugherty. This transcript is premature and the excerpt and the comments made by Defendant must be temporarily stricken from the record for this case.

There are numerous genuine issues of material fact which Plaintiff has clearly outlined above with convincing documented objective evidence of support referenced and included. Because the impact of a successful motion for summary judgement is so drastic, this Court should consider taking this measure cautiously. See Associated Press v. U.S., 1945, 65 S.Ct. 1416, 326 U.S. 1, 89 L.Ed. 2013; Yuba Goldfields, Inc., v. U.S., C.A. Fed. 1983, 723 F.2d 884.

Plaintiff prays that this Court will be reluctant to grant Defendant's Motion for Judgement because this case is far from being clearly favorable to Defendant. See Bayou Bottling, Inc. v. Dr. Pepper Co., D.C. La. 1982, 543 F.Supp. 1255, affirmed C.A. 5th, 1984, 725 F.2d 300, certiorari denied, 105 S.Ct. 123, 469 U.S. 833, 83 L.Ed. 2d 65.

Defendant makes three arguments, the first is that: "This Court Lacks Jurisdiction Because Plaintiff's Judicial Complaint is Untimely." Defendant also claims that the thirty day period to file an appeal of an MSPB decision is jurisdictional. Plaintiff will outline below alleged continuing violations of Defendant towards Plaintiff. The United States Supreme Court has ruled that:

> "...filing a timely charge with the Equal Employment Opportunity Commission ("EEOC") pursuant to . . . Title VII ( ) is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling ..." See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982).

The Tenth Circuit has ruled that "the Continuing Violation theory is an equitable tolling doctrine . . ." See Patricia Baty v. Willamette Industries, Inc., No. 96-2181 JWL in the D.C. Kansas. See also Seals v. Oil Data, Inc., No. 96-5149, 1977 U.S. App. LEXIS 2360, 1997 WL 57133 at *1 (10th Cir. Feb. 12, 1997) (citing Mascheroni v. Board of Regents, 28 F.3d 1554, 1560 (10th Cir. 1994)).

Plaintiff filed a Petition for Review with the Board of the MSPB's 4/6/98 Initial Decision, and

subsequently a motion to dismiss his petition for Board review without prejudice until December 15, 1998, or until 30 days from the date of a final decision by the DOL, whichever occurred first, which was granted. Plaintiff re-filed his petitions with the Board on 1/25/99, and requested another dismissal without prejudice (41 days late). This untimely filing is subject to equitable tolling of the continuing violation doctrine as outlined above.

To benefit from the continuing violation theory, the plaintiff must show either (1) a series of related acts taken against a single individual, one or more of which falls within the limitations period or (2) the maintenance of company-wide policy of discrimination both before and during the limitations period which evidences a pervasive institutionalized system of discrimination. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (10th Cir. Feb. 29, 1996) (citing Purrington v. University of Utah, 996 F.2d 1025, 1028-29 (10th Cir. 1993); Bruno v. Western Elec. Co., 829 F.2d 957, 961 (10th Cir. 1987)).

With respect to the first option above, the Tenth Circuit has set forth several nonexclusive considerations to help determine whether the alleged incidents of discrimination constitute a continuing violation or are discrete unrelated acts: (1) subject matter; (2) frequency; and (3) permanence. Mascheroni, 28 F.3d at 1561.

Subsequent to his removal on 12/10/97 Plaintiff had sought employment with no success. Plaintiff knows that there is significant competition for very few jobs in Southern New Mexico. Due to this fact and the absence of any solid evidence, Plaintiff had no reasonable basis for filing a complaint against Defendant due to his rights

being violated. See Galloway v. General Motors Service Parts Operations, 78 F.3d 1166 (7th Cir. 1996); Hardin v. S.C. Johnson & Son, Inc., 167 F.3d 340, 344 (7th Cir. 1999); Huckabay v. Moore, 142 F.3d 233 (5th Cir. 1998).

Up to and after the period of delay (12/15/98 to 1/25/99) for Plaintiff to re-file his petitions to the Board, Plaintiff had no reasonable basis to assume that his rights were being violated by Defendant. This changed on 9/26/99 when Plaintiff learned that the Carlsbad Environmental Monitoring and Research Center ("CEMRC"), funded by the Defendant, had hired an individual who had no college degree for a job that Plaintiff had applied for. Plaintiff received a notice from CEMRC that he would not be hired only a couple of weeks before the individual with no college degree was hired. Plaintiff had more than seven years of experience and a graduate degree that were directly related to the CEMRC job. Plaintiff then became very aware that his rights were allegedly being violated by Defendant in the same manner as when he had been an employee of Defendant. E.g.: his character and abilities were being attacked to effect his employment. Plaintiff applied for many jobs, with the vast majority of the prospective employers not expressing any interest in hiring Plaintiff despite his high educational level and very broad range of experience.

Plaintiff had applied for three jobs during the period of delay (12/15/98 to 1/20/99) without any

17 results. See Exhibits BL-6 thru BL-8 of Evidence of the Alleged Unlawful Blacklisting of Plaintiff served on 10/3/00. This allegation of Continuing Violation satisfies the first option above of "a series of related acts taken against a single individual" and also satisfies the three

"nonexclusive considerations" set by the Tenth Circuit noted above.

In addition to satisfying the first option for showing continuing violation, Defendant's alleged violations have also satisfied the second option of demonstrating institutional type violations before, during, and after the period of delay. From 1/93 thru 1/96, while Plaintiff was an employee of
18 Defendant, Exhibit O'Leary enclosed at 10, 15, & 20 - 25 clearly demonstrates institutional type violations of Defendant. During the 41 day
19 period of delay are Exhibits DOL-1thru DOL-3 enclosed. Exhibit DOL-1 was received by Plaintiff on 12/15/98 and the delay of receipt of this document dated 12/11/98 was experienced by Plaintiff's DOL Complaint attorney Mr. Edward Slavin, Jr.. A complaint was expressed about the delay in receipt of Exhibit DOL-1, and this is why Plaintiff received the next document from Defendant, Exhibit DOL-3, by Federal Express. One example of a knowingly false representation, which is alleged to have been passed on to DOL judge Lasky by Mr. Ron O'Dowd of Defendant's Albuquerque office, was that Plaintiff had made a "mere oral comment" on 1/5/98 to an agent of the Environmental Protection Agency ("EPA"). Defendant has used this knowingly false representation to eliminate jurisdiction of Plaintiff's claims related to the Clean Air Act ("CAA") employee protection provision coverage. See
20 Exhibit DOL-1 at 4.

Defendant admits that Plaintiff made written comments and NOT a mere oral comment to EPA.
21 See Exhibit DOL-3 at 3. This admitted
22 violation is described within Exhibit DOL-2 at 1 thru 3. Numerous individuals, part of

Defendant's agency, know of this false representation made for the express purpose of stripping Plaintiff of his civil rights and nothing has been done to correct this violation. This argument is an independent basis to justify the application of the Continuing Violation Doctrine. See Parrett v. Raytheon Co., No. 95-3146, 1996 U.S. App. LEXIS 4468, 1996 WL 108494 at *5 (10th Cir. Feb. 29, 1996).

The institutional type Title VII violations of Defendant continue on to this day with no end in sight. This is clearly demonstrated within the
23 enclosed Additional Evidence of the Alleged Unlawful Processing of Plaintiff's Fifth EEO Complaint of Discrimination and Retaliations ("Exhibit EEO-V Processing - II") and the initial
24 evidence of this served on 10/3/00.

The second argument that Defendant makes is that: "This Court Lacks Jurisdiction to the Extent Plaintiff is Appealing the Board's Dismissal of His Claims for Untimeliness." First of all, the U.S. Supreme Court has ruled that filing a timely Title VII charge is not jurisdictional and subject to equitable tolling. Plaintiff is not appealing the Board's dismissal of his claims for untimeliness. What is being appealed is the Board's lack of review of Plaintiff's case on its merits. The continuing violations of Defendant should equitably toll the issue of untimeliness as outlined above. With the untimeliness issue equitably tolled, the United States Court of Appeals for the Federal Circuit does not have jurisdiction to review Plaintiff's case on it merits per 5 U.S.C. § 7703 (a) (2).

If the argument Plaintiff made in support of this Court's granting him equitable tolling for the issue of untimeliness is sound, Defendant's

argument directly above is moot. **If Defendant's argument here was accepted, it would** make the equitable tolling for the continuing violations doctrine meaningless and **overturn all of the case law Plaintiff cited above**. Also, when considering a motion for summary judgement, the court must examine all the evidence in the light most favorable to the non-moving party. See Jones v. Unisys Corp., 54 F.3d 624, 628 (10th Cir. 1995); Adikes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

The third argument that Defendant makes is that:

> "Defendant is Entitled to Summary Judgement with Respect to Plaintiff's Claims that the DOE Interfered with his Right to Receive Medical Treatment."

The Rehabilitation Act applies to some disabled federal employees when medical qualification requirements are justified. This is defined within 5 CFR Part 339 which is the Office of Personnel Management's (OPM's) Medical Qualification Determinations.

This regulation outlines medical requirements that can be established for federal employees who have positions which "involve a high degree of responsibility toward the public or sensitive national security concerns." Differences between federal employees of this sort and private sector employees warrants a deviation in medical requirements. Established medical requirements for some federal series positions are outlined within OPM's Qualification Standards Operating Manual. However, 5 CFR 339 does make note of the requirement that: "Actions under this part must be consistent with . . . Equal Employment Opportunity Commission (EEOC) regulations."

The "Compliance with EEOC regulations" Section 339.103 of 5 CFR clearly outlines that, aside from federal positions with established medical requirements, federal employees are subject to the same rights and considerations as private sector employees. In this regard, since no medical requirements exist for GS 1301 - Physical Scientists within Table III-A of the OPM Manual cited above, I should enjoy essentially the same rights and considerations as private sector employees protected under the Americans with Disabilities Act (ADA). The ADA specifies that notification of an employee's disability and request for reasonable accommodation can even be made by a "family member" to an employer.

Due to the above, therefore, the EEOC
25 Enforcement Guidance on the ADA and Psychiatric Disabilities ("ADA Guide") within Exhibit ADA-13 applies to Plaintiff. This guide notes that **a request for "mental health history" is "not a request for reasonable documentation".** See ADA Guide at 22. The Defendant's "Request for Medical Documentation" (Defendant's Exhibit 11) requests a medical "history" among several other very difficult areas to fully assess for a person's brain injury. This request of Defendant was purposely unreasonable and it does demonstrate pretext contrary to Defendant's claims.

Prayer for Relief:

Plaintiff prays that this Court will recognize, thru the very specific detailing above, that the Continuing Violation Doctrine does indeed apply to this instant case, grant Plaintiff equitable tolling for untimeliness, and deny Defendant's Motion for Partial Summary Judgement.

Dated: October 16th, 2000

Respectfully submitted,
s/Tod N. Rockefeller
319 Sunnyview Street
Carlsbad, NM 88220
(505) 628 - 3541

AFFIDAVIT OF SERVICE

Tod N. Rockefeller, being duly sworn, states that he mailed the foregoing Response to Defendant's Motion to:

U.S. District Court, Dist. of NM
Office of the Clerk, 99-1059 PK/KBM
U.S. Courthouse
333 Lomas BLVD., NW, Suite 270
Albuquerque, NM 87102

Michael Hoses, Ass't U.S. Attorney
U.S. Dept. of Justice
Office of the U.S. Attorney,
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

NOTICE OF FILING to:
Paul Kelly Jr.
District Judge
U.S. Court House
P.O. Box 2384
Santa Fe, NM 87504-2384

with sufficient first class postage attached thereto on this 17th day of October, 2000.

s/Tod N. Rockefeller

Subscribed and sworn to before me this 17th day of October, 2000.

s/Mary Jane Clinton
Notary Public

My commission expires: 07-01-2002

SEAL:
MARY JANE CLINTON
NOTARY PUBLIC
STATE OF NEW MEXICO